



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 122 of 2005

FRANCIS MUGO & 22 OTHERS PLAINTIFFS

VERSUS

JAMES BRESS MUTHEE..... 1ST DEFENDANT

ALEX M. NDURANGU 2ND DEFENDANT

GILBERT KABAGE T/A PATA

COMMERCIAL ENTERPRISES 3RD DEFENDANT

JOHN MUTHEE NGUNJIRI T/A TANGO

AUCTIONEERS & GEN.MERCHANTS..... 4TH DEFENDANT

RULING

The defendants filed an application by way of a notice of motion brought under Section 3A of the Civil Procedure Act seeking orders that the firm of Mukite Musangi & Co. Advocates and in particular Mr. Andrew Mukite Musangi Advocate be disqualified and or barred from the conduct of this suit on behalf of the plaintiffs herein. The application was made on the grounds that the defendants intended to call Mr. Musangi as their witness in that he drew and witnessed a certain lease between the first plaintiff and some of other parties which is relevant in this suit. It was also stated that Mr. Musangi was counsel for the 1st and 2nd defendant's landlord in HCC No.69 of 2005, Ramanbhai Patel & Another vs James Bress Muthee & Another that was pending before the court and therefore there was real possibility of conflict of interest if the said firm of Advocates was allowed to act in this matter.

The second defendant stated in his affidavit in support of the said application that while the aforesaid suit was still pending in court Mr. Musangi drew leases for the plaintiffs and the said leases were the basis of this suit and the same shall be the subject of interpretation by the maker. The first and second defendants said that they intended to call Mr. Musangi as their witness during the hearing hereof so as to assist the court in understanding the basis of the said leases.

Further, the deponent alleged that the leases were drawn in bad faith with the purpose of perpetration of an illegality. He also indicated that it was intended to join the defendants' landlord in these proceedings and there was going to be an obvious conflict of interest if Mr. Musangi continued to act in the matter.

Mr. Waiganjo for the defendants sought to rely on the Court of Appeal decision in **UHURU HIGHWAY DEVELOPMENT LTD & OTHERS VS CENTRAL BANK OF KENYA & OTHERS, Civil Appeal No.286 of 2001**. He also sought to rely on Rule 9 of the Advocates (practice) Rules.

The plaintiffs, through Mukite Musangi & Co. Advocates filed grounds of opposition and dismissed the defendants' application as misconceived and bad in law. They said that there was no basis for the defendants calling Mr. Musangi as their witness and added that the defendants were not party to the said lease. They further stated that there was nothing in principle to preclude the plaintiff's counsel from acting in this suit for both the defendants' landlord and the plaintiffs herein since their interests were mutual and not in conflict.

Mr. Musangi also sought to rely on the same decision and Rule 9 as cited by Mr. Waiganjo.

I have carefully considered all the submissions made before me and perused all the documents and pleadings that were filed by the parties herein. My work was made easy by the fact that the two advocates for the parties herein relied on the same authority and provision of the law in support of their different views on the matter.

Rule 9 of the Advocates (Practice) Rules provides as follows:

“No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear; provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non contentious matter of fact in any matter in which he acts or appears.”

It is not in dispute that the firm of Mukite Musangi & Company Advocates and in particular Mr. Andrew Mukite Musangi Advocate in the said firm has, in an official capacity, been closely involved in tenancy affairs of premises comprised in plot No. NAKURU MUNICIPALITY BLOCK 9/62 which is the subject of several disputes pending before this court. The defendants in this suit have clearly stated that they will be calling Mr. Musangi as a witness to clarify certain issues to do with a lease which he drew relating to the aforesaid property. One of the alleged leases is said to be the basis of this suit.

There is in deed a very serious allegation that was made on oath by the second defendant, and which was not denied, that the leases were drawn in bad faith with the purpose of perpetrating an illegality and the defendants have therefore expressly given notice that they will be calling Mr. Musangi to testify, I believe, in their quest to prove their allegation. It is no longer in the realm of conjecture as to whether Mr. Musangi may be called to testify, he has indeed been put on notice that he will be required to do so and the grounds thereof have been disclosed to him. He cannot therefore be an advocate for the plaintiff and at the same time be a witness for the defendants.

While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an advocate he has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in ***“THE ART OF THE ADVOCATE.”*** As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth.

I believe that Mr. Musangi, as a good officer of the court will ascend to a higher echelon of service to the cause of justice by his disqualification from acting for the plaintiffs in this matter so that he can fulfil the wider cause of his duty.

I therefore allow the defendants application but costs thereof shall be in the cause.

DATED, SIGNED & DELIVERED at Nakuru this 29th day of July, 2005.

D. MUSINGA

JUDGE

29/7/2005